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October 2, 2014

VIA FEDERAL EXPRESS

The Hon. Karen V. Gregory
Secretary of Federal Maritime Commission
800 North Capitol St.
Room 1046
Washington, D.C. 20573

Re: Edaf Antillas, Inc. v. Crowley Caribbean Logistics, LLC; IFS International Forwarding, S.L.; and IFS Neutral Maritime Services, Docket No. 14-04

Dear Ms. Gregory:

Enclosed for filing are an original true copy and five (5) additional copies of the Reply Memorandum of Crowley Caribbean Logistics, LLC in Support of Their Motion to Dismiss.

Please contact me if you have any questions.

Sincerely,

Eric C. Jeffrey
Counsel for Crowley Caribbean Logistics, LLC

Lindsey M. Nelson
Counsel for Crowley Caribbean Logistics, LLC

Enclosure

FEDERAL MARITIME COMMISSION

DOCKET NO. 14-04

EDAF ANTILLAS, INC.

v.

CROWLEY CARIBBEAN LOGISTICS, LLC;
IFS INTERNATIONAL FORWARDING, S.L.; and
IFS NEUTRAL MARITIME SERVICES

REPLY MEMORANDUM OF CROWLEY CARIBBEAN LOGISTICS, LLC IN SUPPORT OF MOTION TO DISMISS

Crowley Caribbean Logistics, LLC ("CCL") established the following in its memorandum in support of its motion to dismiss ("opening memorandum:

- CCL was not a "common carrier" for the shipment at issue, so the claims against it are not within the FMC's subject matter jurisdiction;
- Complainant failed to plead essential elements of a Section 10(b)(3) claim – that CCL retaliated against Complainant for using another carrier or for filing a complaint; and
- Complainant failed to plead essential elements of a Section 10(b)(8) claim – that CCL provided its service pursuant to a CCL tariff, that there was a triangular relationship between Complainant and another, similarly-situated shipper, and that the difference in treatment was the proximate cause of injury.

Complainant makes no serious attempt to rebut any of these demonstrations in either of its two opposition memoranda (we use the plural because Complainant made arguments concerning CCL not only in its response addressed to CCL, but also in its response nominally

addressed to the IFS Respondents). Instead, Complainant essentially asks the Presiding Judge to forgive Complainant's pleading trespasses and let it pass to the next stage anyhow.

As elaborated below, Complainant misconstrues the requirements to avoid dismissal, and does nothing in either memorandum to dent any of the demonstrations CCL made in support of its motion to dismiss.

1. **Pleadings must be more than Counsel Assertions and Might Haves**

Complainant's opposition memoranda only further emphasize that its Complaint fails to fulfill the necessary requirements to survive a motion to dismiss. The pleading standards "demand[] more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Complaint here does no more than "merely create a suspicion" of the facts needed to state a claim for relief, which is not sufficient under Federal Rule of Civil Procedure 12(b)(6). *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp 235-236 (3d ed. 2004)).

Counsel for Plaintiff has attempted to paper over the deficiencies in the Complaint by suggesting unsupported hypotheticals. But assertions of counsel on reply are no substitute for well-pleaded allegations. *See, e.g., In re PHP Healthcare Corp.*, 128 Fed. Appx. 839, 847; 2005 U.S. App. LEXIS 3571, at *18-19 (3d Cir. 2005) ("a lawyer's statement in a response brief is no substitute for adequately pleaded facts in a complaint"); *Novak v. Kasaks*, 997 F. Supp. 425, 432 (S.D.N.Y. 1998) ("unsworn representations made by counsel cannot substitute for formal pleadings"). Here, moreover, counsel's testimony, even if credited, would not suffice to save the Complaint from dismissal.

2. The FMC Lacks Subject Matter Jurisdiction over the Claims Against CCL.

CCL demonstrated in its opening memorandum that the FMC lacks subject matter jurisdiction over the claims against CCL because CCL was clearly not a "common carrier" with respect to this transaction.[1] CCL cited both court and FMC decisions holding that the FMC's subject matter jurisdiction depends precisely on whether a party is acting as a common carrier (or MTO) in the specific circumstances[2], and the decision of the D.C. Circuit in *Landstar Express America, Inc. v. FMC*, 569 F.3d 493, 497 (D.C. Cir. 2009), that an entity performing agency services for an NVO is not a common carrier.

Complainant appears to accept that CCL is not within the FMC's subject matter jurisdiction unless it acted as a common carrier for this *specific* transaction, as it addresses not one of the cited cases dealing with that issue. Rather, Complainant simply tosses off four more or less one-liners (in the brief span of just over one page) as to why the FMC should create jurisdiction.

First, Complainant quotes the statutory definition of a common carrier, and announces, *mirabile dictu*, that this makes CCL a common carrier. Review of the statutory language, however, demonstrates the contrary. As quoted by Complainant itself, an entity is ***not*** a common carrier unless it "assumes responsibility for the transportation from the port or point of receipt to

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[1] Complainant does not (and could not) dispute that CCL was not acting as an ocean freight forwarder, since under the 1984 Act those OTIs exist only for ***export*** transactions. Strangely, however, Complainant continues to assert that IFS may be an ocean freight forwarder for the same ***import*** transaction. We note this not to defend IFS, but rather because it is symptomatic of Complainant's lack of attention to the express language of the statute.

[2] *American Ass'n of Cruise Passengers, Inv. v. Carnival Cruise Lines, Inc.*, 911 F.2d 786 (D.C. Cir. 1990); Puerto *Rico Ports Authority v. FMC*, 919 F.2d 799 (1st Cir. 1990); *Foreign-to-Foreign Agreements*, 24 S.R.R 1448 (FMC 1988), reconsideration denied, 25 S.R.R 455 (FMC 1989), affirmed, 951 F.2d 950, 954 (9th Cir. 1991); 64 Fed. Reg. 11205 (Mar. 8, 1999).

the port or point of destination." [3] Complainant does not allege that CCL issued a bill of lading to Complainant, or that it otherwise agreed to be responsible for the shipment. Indeed, it acknowledges that "CCL may have had nothing to do with the cargo at origin." While Complainant goes on to say that this is a "presumption" that cannot be made at this early stage, the burden is on Complainant to ***plead facts*** sufficient to show that CCL ***did*** take responsibility at origin, not to speculate through the *ipse dixit* of counsel that it ***might*** have done so. *See, e.g., DNB Exports LLC v. Barsan Global Lojistiks Ve Gumruk Musavirligi A.S.*, 32 SRR 550, 553 (ALJ, Admin Final 2011) (on motion to dismiss, Complainant bears burden of demonstrating subject matter jurisdiction); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

Complainant here asks the Presiding Judge for a free pass to the next stage so that it may look for what it was required to plead in the first case. This is simply not permitted by the rules governing motions to dismiss. Complainant cannot on a motion to dismiss ask leave to go on a fishing expedition to find something it was required to know before filing a complaint. *See, e.g., Paylor v. Hartford Fire Insurance Co.*, 748 F.3d 1117, 1127 (11th Cir. 2014) ("Civil pleadings are supposed to mark the boundaries for discovery; discovery is not supposed to substitute for definite pleading); *Mama Cares Foundation v. Nutriset Société Par Actions Cimplifiée*, 825 F. Supp. 2d 178, 184 (D.D.C. 2011) ("[t]he discovery rules are designed to assist a party to prove a claim it reasonably believes to be viable *without discovery*, not to find out if it has any basis for a claim") (quoting *Micro Motion, Inc. v. Kane Steel Co.*, 894 F.2d 1318, 1327 (Fed. Cir. 1990)).

Complainant next suggests that any entity that has anything to do with any part of the transportation is a common carrier ("it is certain that CCL played **a** role, ***perhaps*** a prominent

[3] As discussed in the opening memorandum at n. 9, there are also no allegations that CCL, as agent to IFS, held out to Complainant to do anything, much less provide common carrier services. Complainant has not addressed, much less rebutted, that assertion.

one" with respect to cargo handling at destination). Under Complainant's view, there could be five, ten, or even dozens of "common carriers" for transportation under a single bill of lading, most of which would have played a role only at one end of the transportation. This is flatly contradictory not only to common understanding, but also to the FMC's long-standing holding that "[a]ctual liability as a common carrier over the ***entire*** journey ***including the water portion*** is essential. *Common Carriers by Water – Status of Express Companies, Truck Companies and other Non-Vessel Carriers*, 6 F.M.B 245, 256 (1961). There, the Commission held that an entity that took responsibility for portions of the transportation, but not the water portion, did not meet the definition of "common carrier."

In addition, Complainant's proposed interpretation would effectively eliminate the distinction between NVOCCs and Ocean Freight Forwarders, which play a large role in ocean transportation.[4] It would also mean that if a container fell off a ship, not only the NVOCC that issued the bill of lading, but also any freight forwarder, terminal operator, customs broker, destination agent, or anyone else who played a role in the transportation would be liable as a common carrier. As *Common Carriers* illustrates, this is simply not the law.

Complainant's unsupported suggestion is also flatly contrary to *Landstar*, which Complainant purports not to understand. There, the D.C. Circuit explicitly held that "an agent of an NVOCC by definition is not a 'common carrier,' and thus not an 'NVOCC' as described in the Act." *Landstar Express America, Inc. v. FMC*, 569 F.3d 493, 498 (D.C. Cir. 2009). *See also id.* at 497 ("An agent of a disclosed principal also does not ordinarily assume responsibility for the transportation of the cargo as the principal bears the burden of liability"). The Complaint

[4] Ocean Freight Forwarders are not subject to the prohibited acts addressed to common carriers, but would become so under Plaintiff's theory of jurisdiction.

here alleges that CCL acted as an agent of IFS. Under the clear holding of *Landstar,* CCL could not also be the common carrier vis-à-vis Complainant.

For its third swing, Complainant argues that CCL may not excuse itself from liability by private contract. That may, or may not, be true, but it is totally beside the point. The issue is not whether CCL excused itself, but whether it ever accepted responsibility in the first place by word or deed. As Complainant's own allegations make clear, CCL did not issue a bill of lading or otherwise agree with Complainant to transport its cargo from origin or destination. That was IFS. All CCL did was provide unregulated customs clearance and delivery services to IFS that may be performed by any unlicensed agent.[5]

Having struck out on the first three pitches, Complainant does not return to the dugout, but instead suggests vaguely that it "cannot obviate any role CCL *might* have played" in the exportation of the noncompliant container from Puerto Rico to St. Maarten (where it was rendered compliant without charge to Complainant). Speculation as to what CCL "might" or might not have done certainly does not satisfy Complainant's burden to allege facts sufficient to demonstrate subject matter jurisdiction. In deciding a motion to dismiss for lack of subject matter jurisdiction, the court may consider the complaint standing alone or may also consider facts evidenced in the record. *See Herbert v. National Academy of Sciences*, 974 F.2d 192, 197 (D.C. Cir. 1992). Complainant's "what ifs" in its opposition are not facts evidenced in the

[5] In footnote 1 on page 2, Complainant asserts that CCL's argument "implies that any import shipments shipped by a foreign freight forwarder who has an unlicensed agent in the U.S. are completely outside the jurisdiction of the Commission." That is patently untrue, reflecting Complainant's misunderstanding of the Shipping Act regime. If the foreign freight forwarder issued a bill of lading, it would be considered an NVO, and would be subject to FMC jurisdiction for the transaction. If it did not issue a bill of lading, the ocean carrier would be the responsible bill of lading carrier, and the aggrieved party could file an FMC complaint against the ocean carrier. And this of course is on top of remedies that the aggrieved party may have in court in the United States or the relevant foreign country. As the D.C. Circuit has made clear, the FMC is a forum of limited jurisdiction specified in its governing statute, and not the arbiter of all things having anything to do with ocean shipping.

record. Moreover, any role CCL "might" have played in the exportation would have been for the account of its principal, IFS, and Complainant has not alleged otherwise.[6]

Contort as it might, Complainant simply cannot twist CCL's limited role at the destination end of this transaction into acting as a common carrier as defined in the 1984 Act.

3. Complainant Makes No Attempt to Plead a Claim Under Section 10(b)(3)

CCL demonstrated in its opening memorandum that a claim under Section 10(b)(3) is required – both by the statutory language, which starts with the words "to retaliate," and by FMC case law – to plead that the respondent's actions were taken in retaliation for the complainant filing a claim or patronizing another carrier. *California Shipping Lines, Inc. v. Yangming Marine Transport Corp.*, 25 S.R.R 1213, 1224-25 (FMC 1990) (holding retaliation to be a mandatory element of a 10(b)(3) claim).

Complainant's response is simply to ignore the FMC, not even discussing the language of the Act or the Commission's holding in California Shipping Lines. As a substitute for statutory analysis, Complainant makes scornful reference to the FMC's requirements as being nothing more than "magic words" that Complainant is free to ignore in its admittedly "cursory" allegations. It then lists some of its factual allegations and asserts without discussion that they should suffice to allow it passage to the next stage.

CCL may not know the words needed to open Alibaba's cave (or even why one would seek to do so), but it does know what the FMC requires of a 10(b)(3) claim. Complainant is either being disingenuous or does not understand the word "retaliate." We assume it is the latter

[6] Exhibit 14 to the Complaint is a non-negotiable bill of lading reflecting the transportation between Puerto Rico and St. Maarten. This is not a bill of lading for transportation, but rather a simple notification to Complainant of cargo receipt and tax released status. Complainant has not asserted otherwise. And as Exhibit 13 to the Complaint (CCL's invoice) shows, CCL billed Complainant only for the three destination services provided by CCL – totaling $116 (BL release fee, scanning charge, and CBPA inspection) -- along with the charge for ocean freight on behalf of IFS.

and note that the word means: "To take revenge for an injury, insult, etc.; to attack in return." *"retaliate"*, Oxford English Dictionary, *available at* http://www.oed.com/view/Entry/164167?rskey=unlVPN&result=1&isAdvanced=false#eid (Sept. 30, 2014). While Complainant recites what it contends to be unreasonable actions by CCL, Complainant nowhere asserts either that it injured or insulted CCL or that CCL's actions were taken as a response in kind to such an attack.

4. **Complainant still has not Stated a Viable Claim Under Section 10(b)(8)**

CCL showed in its opening memorandum that the Complaint failed to allege mandatory elements of a 10(b)(8) claim: (i) that CCL provided services to Complainant pursuant to a CCL tariff, (ii) that CCL treated Complainant differently than it treated an identifiable, similarly-situated, shipper, and (iii) that Complainant was injured as a result of the discrimination. Complainant fails to remedy any of these deficiencies, but instead offers counsel's unadorned evaluation that the Complaint meets the FMC's standards.

As to the first essential element – of service pursuant to a tariff – Complainant purports not to see the fatal defect because "Complainant's cargo was transported under someone's tariff." This of course, is not in the pleadings, and is pure supposition of Complainant's counsel. For aught that appears, the cargo could just as easily have moved by service contract.

Even assuming that the cargo moved under "someone's tariff," there is no allegation or reason to believe that it was CCL's tariff. Complainant's counsel argues weakly that the invoice it received included some charges for CCL services that "presumably, appear in their tariff." Even apart from this being a presumption of counsel and not an allegation in the Complaint, the assertion is ill-founded. As the Complaint itself states, CCL provided its customs clearance and local delivery services in its capacity as an agent or subcontractor to IFS, which could well have

been at non-tariff, negotiated rates. And even if CCL had provided the services directly to Complainant, these are unregulated services that anyone could have provided without a tariff, unless they were part of a through, inclusive rate. Any such rate would have been provided by the bill of lading carrier – here IFS – not by the agent CCL.

Nor has Complainant even attempted to identify a similarly-situated, differently-treated shipper. Complainant's counsel calculates on a purely arithmetical basis that CCL might have handled 70 compliant customers during the month of Complainant's shipment. Putting aside the inherent speculation inherent in this claim, including as to how compliant customers were treated, compliant customers are inherently ***not*** similarly situated to non-compliant customers. As a matter of law, one's cargo may enter the country, clear customs, and be delivered to the consignee; the other's may not. Thus, CCL could not legally treat them the same.[7] To the extent that there were any similarly situated shippers, it would have been at the time that the shippers delivered their cargo in Spain, where the containers were either fumigated in compliance with U.S. law or not. But as the Complaint itself makes clear by restricting the fumigation claim to IFS (Compl. ¶ A), CCL had nothing to do with that aspect of the transaction.

Finally, Complainant's struthious denial that any injury it may have suffered was not proximately caused by a difference in treatment is unavailing. As explained in CCL's opening memorandum, any such injury flows from the allegedly unreasonable treatment itself, not how that treatment compared to treatment of others. Complainant would be no better off if all others had been treated as it was, nor any worse off if others had been afforded even better treatment.

[7] Even if this were considered different treatment for purposes of Section 10(b)(8), it would need to be considered a reasonable distinction, as it is mandated by U.S. law.

5. Alleged Damages

Given that the charges against CCL must be dismissed, there is little cause to discuss injury here, and so we leave that to IFS. We cannot help but point out, however, that Complainant's $80,000 claim for loss of the time value of money (i.e., that early receipt of the sales receipts would have allowed it to earn money with those funds (Opposition Memorandum to IFS Motion to Dismiss at 5) is totally unrecoverable, because such loss is compensated by interest, not speculation as to what Complainant might have done with the funds. *See* 46 U.S.C. 41305 ("actual injury" includes interest from the time of the harm); *Bernard & Weldcraft Welding Equipment v. Supertrans International, Inc.,* Docket No. 02-12, 2003 FMC LEXIS 12, at *31-34 (Jan. 8, 2003, Admin Final) (the actual injury to a complainant whose receipt of funds was delayed due to a delay in the release of goods on a shipment is the interest that would have been generated by the funds during the period of delay).

6. Request to Amend

In its conclusion, Complainant asks for an opportunity to amend its Complaint. But Complainant does not even suggest what it could add that might make a difference. And in any event, given that the bill of lading here was issued by IFS, not CCL, there is nothing Complainant could change that would allow the Commission to create jurisdiction over CCL.

7. Conclusion

For the above reasons, as well as those in the opening memorandum, the Complaint should be dismissed as to CCL, without leave to amend.

Dated: October 2, 2014

Respectfully submitted,

BY: _____

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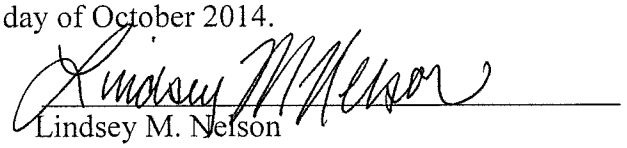
Certificate of Service

I hereby certify that I have this day served the foregoing document upon all parties of record by e-mailing a copy to each person.[7]

Dated at Washington, DC, this 2nd day of October 2014.



Lindsey M. Nelson
Counsel for Crowley Caribbean Logistics, LLC

[7] The Parties agreed in the August 11, 2014 Joint Status Report that service among them would be effectuated by email, to reduce both delays and costs.